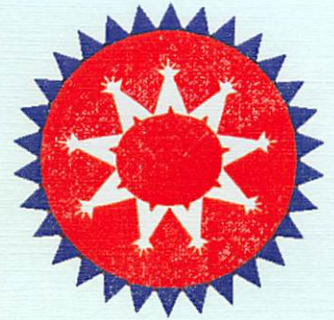




Oglala Sioux Tribe

Office of the President

P.O. Box #2070
Pine Ridge, South Dakota 57770
1(605) 867-5821 Ext. 8420 (O) / 1(605) 867-6076 (F)



Troy "Scott" Weston

October 30, 2017

Elizabeth K. Appel, Director
Office of Regulatory Affairs & Collaborative Action Indian Affairs
U.S. Department of the Interior
1849 C St., NW
Mail Stop 4660-MIB
Washington, DC 20240
consultation@bia.gov

RE: Written Comments to Docket ID: BIA-2016-0007 (Traders with Indians – Advance Notice of Proposed Rulemaking) and Extension of Comment Period to October 30, 2017

Dear Ms. Appel:

Please find below the comments of the Oglala Sioux Tribe on the Federal Indian Traders License Regulations concerning the Preemption of State Taxation of Indian Commerce.

Tribal taxation is essential to fund tribal self-government and territorial management. Historically, Indian country was the separate inviolate jurisdiction of Indian nations, so long as Indian treaty rights were not ceded or lands relinquished. *See Kansas Nebraska Act, 10 Stat. 277 (1854)*. Based upon this background, several western states, including North and South Dakota disclaimed jurisdiction over the lands of Indian tribes and Indians, and recognized continuing Federal jurisdiction over Indian affairs. Yet, the Supreme Court has failed to recognize the full scope of Indian sovereignty, self-government and self-determination reserved by treaty and permitted state tax encroachment on tribal economies by sometimes allowing states to impose taxation on Indian commerce in Indian country.

A clear statement by the Secretary of the Interior is necessary to preempt concurrent state taxation of Indian commerce in Indian country because such state taxation creates barriers to tribal government taxation within our own jurisdictions. Moreover, dual state taxation of Indian commerce has resulted in the failure of tribal economic development. For example, a non-Indian company recently sought to enter a joint venture with our Tribe to develop a water bottling plant. In the absence of

clear Federal preemption of state taxation, the deal was made more complex and ultimately did not move forward.

We would like to engage in joint efforts to develop agricultural enterprises, such as buffalo herds, sunflower crops, etc., but the specter of dual state taxation inhibits development on Indian lands. There are many more examples.

Historical Background: Federal Indian Traders Licenses

The 1787 Constitutional Convention convened to address the flaws in the American system of governance under the Articles of Confederation. Too often, the Articles of Confederation granted authority to the United States while reserving the state authority, thereby creating "chaos." To prevent encroachment on Federal Government Authority, James Madison recommended a provision to clarify Federal authority to regulate Indian affairs because to states had engaged in treaties and even wars with Indian nations. With the support of George Washington, Madison's proposal for plenary Federal authority over Indian commerce was incorporated in Article I, Section 8 of the Constitution: Congress is thereby vested with power to "regulate commerce with the foreign nations, among the several states, and with the Indian tribes."

Prior to the Declaration of Independence, the Continental Congress established Federal Indian Traders Licenses in 1775. From the first days of the United States, Congress regulated Indian trade through Federal Indian Traders Licenses. Before he became President, Thomas Jefferson was an author of the Declaration of Independence, a Framers of the Constitution, and the first Secretary of State. In 1802, President Jefferson reaffirmed the system of U.S. Indian trading posts in an effort to oust the British from Indian trade.

In *Central Arizona Machinery v. Arizona Tax Comm'n*, 448 U.S. 160 (1980), the Supreme Court explained the Federal Indian Traders License Statutes and Regulations:

In 1790, Congress passed a statute regulating the licensing of Indian traders. Act of July 22, 1790, ch. 33, 1 Stat. 137. Ever since that time, the Federal Government has comprehensively regulated trade with Indians to prevent "fraud and imposition" upon them. H.R.Rep. No. 474, 23d Cong., 1st Sess., 11 (1834) (Committee Report with respect to Indian Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 729). In the current regulatory scheme, the Commissioner of Indian Affairs has "the sole power and authority to appoint traders to the Indian tribes and to make . . . rules and regulations . . . specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. 261. All persons desiring to trade with Indians are subject to the Commissioner's authority. 25 U.S.C. 262. The President is authorized to prohibit the introduction of any article into Indian land. 25 U.S.C. 263. Penalties are provided for unlicensed trading, introduction of goods, or

residence on a reservation for the purpose of trade. 25 U.S.C. 264. The Commissioner has promulgated detailed regulations to implement these statutes. 25 CFR Part 251 (1979).

Numerous Indian treaties also support the regulation of Indian trade and Commerce. The 1778 Treaty with the Delaware Nation, the first U.S.-Indian Nation Treaty, provides that the United States shall secure to the Delaware Nation “*well-regulated trade.*” 7 Stat. 13; 1778 Treaty with the Delaware, Art. V. Concerning the Treaty with the Delaware Nation, the Supreme Court has explained: “This treaty, in its language, and in its provisions, is formed as near as may be, on the model of treaties between the crowned heads of Europe.” *Worcester v. Georgia*, 31 U.S. 515, 550 (1832).

~~In the 1825 Treaty with the Sioune and Ogallala Bands of Sioux Indians, 7 Stat. 259, the respective Nations agreed in Article 5 that:~~

“the United States agree to admit and license traders to hold intercourse with said bands, under mild and equitable regulations: in consideration, of which the Sioune and Ogallala bands bind themselves to extend protection to the persons and the property of the traders, and the persons legally employed under them, while they remain within the limits of their district of country.”

In 1825, the United States entered substantially similar treaties with the Teton, Yankton, Yanctonies Bands and the Hunkpapa Band of the Sioux Tribe.

In *Warren Trading Post v. Arizona Tax Comm’n*, 380 U.S. 685 (1965), the Supreme Court held that the all encompassing Federal Indian Traders Statutes and Regulations preempted state taxation of Federal Indian Traders.

In *Central Machinery, supra*, the Supreme Court held that state taxation of non-Indian machine suppliers to Indian tribes, engaged in commerce to facilitate agricultural production on Indian lands, was preempted by the Federal Indian Traders License Statutes and Regulations.

Accordingly, the Constitution, the Federal Indian Traders License Statutes and Regulations, Indian Treaties, and Supreme Court case law stand for the proposition that the United States may preempt state taxation of non-Indians engaged in business with Indian tribes in Indian country.

Balancing Federal, Tribal and State Interests in Economic Development

In *White Mountain Apache v. Bracker*, 448 U.S. 130 (1986), the Supreme Court used a tri-partite Federal and Tribal versus State balancing test absent a clear statement from the United States concerning state taxation of non-Indian logging trucks engaged in forestry on Indian lands. First, state taxation may be preempted by Federal law, like the Federal Indian Traders Statutes and Indian Treaties, or by Tribal

Self-Government, "the right of reservation Indians to make their own laws and be ruled by them." The tradition of Indian sovereignty "is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development." 448 U.S. at 143.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 220 (1987), the Supreme Court held that the State of California and Riverside County had no power to impose state laws to regulate Indian gaming operations supporting "reservation generated value." The Supreme Court was particularly informed by President Reagan's 1983 American Indian Policy Statement and the Secretary's regulations:

This case ... involves a state burden on tribal Indians in the context of their dealings with non-Indians.... The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.

These are important federal interests. They were reaffirmed by the President's 1983 Statement on Indian Policy. More specifically, the Department of the Interior, which has the primary responsibility for carrying out the Federal Government's trust obligations to Indian tribes, has sought to implement these policies by promoting tribal bingo enterprises. Under the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.* (1982 ed. and Supp. III), the Secretary of the Interior has made grants and has guaranteed loans for the purpose of constructing bingo facilities. The Department of Housing and Urban Development and the Department of Health and Human Services have also provided financial assistance to develop tribal gaming enterprises. See S. Rep. No. 99-493, *supra*, at 5. Here, the Secretary of the Interior has approved tribal ordinances establishing and regulating the gaming activities involved. See H. R. Rep. No. 99-488, p. 10 (1986). The Secretary has also exercised his authority to review tribal bingo management contracts under 25 U. S. C. § 81, and has issued detailed guidelines governing that review.

These policies and actions, which demonstrate the Government's approval and active promotion of tribal bingo enterprises, are of particular relevance in this case.

The Secretary Has Authority to Manage Indian Affairs and May Preempt State Taxes to Prevent Encroachment on Tribal Self-Government and Interference with Tribal Economic Development

Under 25 U.S.C. secs. 2 and 9, the President and the Secretary of the Interior have broad authority to manage Indian affairs and to implement the treaties and statutes of the United States. When the Secretary makes a firm, statutory and treaty based determination that state taxation of Indian commerce interferes with the Federal Indian Self-Determination Policy and the right of Indians to self-government,

self-determination, and sovereignty, the Federal court should defer to the Secretary's informed judgment.

The Secretary's font of power is not only the Federal Indian Traders License Statutes but is also Federal Indian treaties, general statutes for the management of Indian affairs, promotion of Indian Self-Determination and Economic Development, and management of Indian lands and resources.

Conclusion

The Supreme Court's current case-by-case approach to state taxation of non-Indians engaging in Indian commerce in Indian country, which has struck down state taxation in some cases while upholding state taxation in other cases, creates significant uncertainty. The uncertain nature of Supreme Court decision-making thereby undermines Indian economic development, tribal self-government and the power to tax to raise revenues. The Secretary of the Interior under the Federal Traders License Statutes, Indian treaties, and modern Indian Self-Determination and Economic Development legislation empowers the Secretary to make clear that state taxation of Indian commerce in Indian country is preempted by Federal law because it interferes with Indian Self-Determination and Self-Government.

Moreover, the Secretary should clarify that "Indian country generated value" is not subject to state taxation when traded among Indian reservations because it is one of the most important opportunities to boost reservation economies. Indian tribes engaged in Indian gaming purchase \$10 Billion in annual goods and services, and there is every reason for Indian tribes to do business with other Indian tribes, if the sanctity of Indian country generated value is recognized.

The Secretary should fulfill the Federal treaty and trust responsibility to protect Indian nations by preempting contrary state taxation of Indian commerce. Thank you for the opportunity to comment on this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Troy S. Weston". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Troy S. Weston, President